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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1215**

Andrew John Johnson, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed May 19, 2009
Affirmed
Harten, Judge***

Hennepin County District Court
File No. 27-CR-05-004436

Lawrence Hammerling, Chief Appellate Public Defender, Sara J. Euteneuer, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Michael O. Freeman, Hennepin County Attorney, David C. Brown, Assistant County Attorney, C-2000 Government Center, 300 South Sixth Street, Minneapolis, MN 55487 (for respondent)

Considered and decided by Klaphake, Presiding Judge; Hudson, Judge; and Harten, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

HARTEN, Judge

Appellant petitioned for postconviction relief on the ground that his waiver of his *Blakely* right to a jury determination of factors used to enhance his sentence was not knowing, voluntary, or intelligent. He challenges the denial of the petition. Because we see no abuse of discretion in the denial, we affirm.

FACTS

On 23 January 2005, appellant Andrew John Johnson sexually assaulted his 13-year-old niece while she was in bed at appellant's home. He pled guilty to second-degree criminal sexual conduct. Appellant's criminal history score was eight; the presumptive sentence was 62 months. Appellant entered into a plea agreement calling for a 72-month stayed sentence. On 8 August 2005, after a sentencing hearing in which he waived his *Blakely* right to a jury determination of aggravating factors, the district court sentenced appellant to an upward durational departure of 72 months and a downward dispositional departure of a stayed sentence with probation. Appellant did not appeal from the conviction or the sentence.

On 8 January 2007, after appellant violated his probation, the district court revoked appellant's probation and he was sent to prison for 72 months. He did not appeal from the revocation.

On 1 April 2008, appellant petitioned for postconviction relief, claiming that his waiver of his *Blakely* rights at the sentencing hearing was inadequate. The

postconviction court denied his petition. Appellant challenges the denial, arguing that it was an abuse of discretion.

DECISION

“The decisions of a postconviction court will not be disturbed unless the court abused its discretion.” *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). In an appeal from a denial of postconviction relief, issues of law are reviewed de novo and issues of fact are reviewed for the sufficiency of the evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007).

Appellant argues that the waiver of his *Blakely* rights was not knowing, intelligent, or voluntary. A waiver is knowing, intelligent, and voluntary if it meets the requirements of Minn. R. Crim. P. 26.01, subd. 1(2)(a). *State v. Thompson*, 720 N.W.2d 820, 827 (Minn. 2006). Minn. R. Crim. P. 26.01, subd. 1(2)(a), provides that a defendant may waive his right to a jury trial, “orally upon the record in open court, after being advised by the court of the right to a trial by jury and after having had an opportunity to consult with counsel.”¹ The *Thompson* court found a waiver to be knowing, voluntary, and intelligent when (1) the district court informed the defendant of the *Blakely* decision and of the right to a jury trial on sentencing enhancement factors, (2) the court asked the defendant if she had questions on the *Blakely* issue and she answered in the negative, and (3) the court asked the defendant if she understood she was waiving the right to have the jury decide on the factual basis for a sentencing departure and the defendant answered in

¹ While Minn. R. Crim. P. 15.01, subd. 2, provides eleven specific questions to which a defendant is to respond in waiving the right to a jury trial on aggravating factors, that rule was not in effect on 8 August 2005, the date this case was heard by the district court.

the affirmative. *Id.* In the instant case, the transcript of the district court's interrogation of appellant at the sentencing hearing indicates that the court complied with *Thompson*.

The district court told appellant, "[Y]ou have a right to a jury trial not only on the charge itself, but on what the sentence should be." The district court then asked appellant if he understood that he had agreed to a more serious sentence because "the crime . . . occurred in this girl's bedroom," which was "her zone of privacy, kind of a special place for her." Appellant answered, "Yes." The district court asked appellant if he understood that a jury could decide whether being sexually assaulted would have a greater impact if it happened in a person's own bedroom. Appellant answered, "Yes." The district court then said, "I'm not trying to put words in your mouth, so if [I do] you say, hey, no, that's not what . . . my thinking is." The district court asked, "So you're willing to accept the 72 months and . . . give up your right to a jury trial on that?" Appellant again answered, "Yes." Finally, the district court asked appellant, "Do you have any questions about this process?" Appellant first answered, "No," and then asked an unrelated question about whether he would get credit for time served.

Thus, appellant said he understood that he had agreed to an increased sentence, that the reason for the increase was the fact that the crime occurred in the victim's bedroom, that her bedroom would be considered a zone of privacy or special place for her, that a jury could decide that this was a reason for the increased sentence, and that he accepted the 72 months and gave up his right to a trial on the sentence. His waiver was knowing, intelligent, and voluntary. *See id.*

To argue that his waiver of a jury determination of the aggravating factor was not sufficient to allow the sentence enhancement, appellant relies on *State v. Hagen*, 690 N.W.2d 155, 160 (Minn. App. 2004) (reversing a sentence because the upward departure violated the defendant’s right to a jury trial on aggravating factors). But *Hagen* is distinguishable: there the defendant “was not informed that he had a right to a jury determination on any fact used to support an upward sentencing departure.” *Id.* at 159. Appellant was clearly informed of that right and said he understood it.

The postconviction court did not abuse its discretion in denying appellant’s petition for postconviction relief.

Affirmed.